No. 20,585

In the United States Court of Appeals

for the Ninth Circuit

ANITA T. OWENS
Appellant,

vs.

RAYMOND WHITE, JOHN C. McCARTER,
ALFRED POPMA, and ST. LUKES
HOSPITAL, a corporation
Respondents.

APPEAL FROM SUMMARY JUDGMENT OF DISMISSAL
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO,
SOUTHERN DIVISION

HONORABLE RAY McNICHOLS, Judge

BRIEF OF RESPONDENTS DOCTORS RAYMOND WHITE, JOHN C. McCARTER and ALFRED POPMA

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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TEXTS

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STATEMENT AS TO JURISDICTION AND FACTS

No question has ever been raised as to the jurisdiction of the Federal Court over this case. The Plaintiff at the time of the commencement of the action was a citizen of the State of California. All four Defendants were citizens of the State of Idaho. The amount in

controversy exceeded the sum of $10,000.00 over and above interest and costs.

The Statement of Facts as set out in Appellant's Brief is, to say the least, about as favorable to her as could be done. We could give another side of the picture but it would only belabor this Court and, in the final analysis, we believe that in our Argument we have pointed out that the Findings of Fact are well supported by substantial evidence and any controversy or conflict in the facts becomes entirely immaterial.

POINTS AND AUTHORITIES

I.

Limitation of actions in Idaho for personal injuries is statutory.

Sec. 5-219 (4) Idaho Code

II.

Even though it is entirely possible for different minds to reach different conclusions upon the facts, the rule of presumption of correctness of the decision of the trial Court reached upon trial in which the witnesses are present, requires that "however meager" the supporting evidence may be, the findings of the trial Court must be sustained.

Chatterton vs. Luker
66 Idaho 242
158 P 2d 809

Nelson vs. Altizer
65 Idaho 428
144 P2d 1009

Loosli vs. Heseman
66 Idaho 469
162 P2d 393

Conley vs. Amalgamated Sugar Co.
74 Idaho 416
263 P2d 705

In Re Randall's Estate
58 Idaho 143
70 P2d 389

Smith vs. Clearwater County
65 Idaho 271
143 P2d 561

Watkins vs. Watkins
76 Idaho 316
281 P2d 1057

Angleton vs. Angleton
84 Idaho 184
370 P2d 788

Rule 52 IRCP

III.

In Idaho a married woman may commence and maintain an action in her own name for her personal injuries without joining her husband as a party plaintiff.

Muir vs. City of Pocatello
36 Idaho 532
212 Pac 345

Lorang vs. Hays
69 Idaho 440
209 Pac 2d 733

Frederickson & Watson Constr. Co., et al vs. Boyd
102 Pac 2d 627

Idaho Territorial Laws
1863-64, p. 557

Idaho Territorial Laws
1880-81, p. 32

Idaho Territorial Laws
1863-64, p. 78

Idaho Territorial Laws
1874-75, p. 80

Idaho Territorial Laws
1880-81, p. 35

Revised Statutues of Idaho 1887, Section 4093

Idaho Session Laws
1903, p. 346

Sec. 5-230(4) Idaho Code

ARGUMENT

In our opinion the Appellant has not only missed the points of law involved, but has entirely misconstrued the opinion of this Court on the former appeal as found in Owens vs. White, et al, 342 Fed 2d 817. In that opinion Judge Koelsch, speaking for the Court said, among other things:

"Whether plaintiff's claim has accrued is a question of law (**Chemung Mining Co. vs. Hanley**, 9 Idaho 786, 77 Pac. 226 (1904)), and like all issues of law must be resolved by the court even though this will require evidence; in other words, the issue presents a preliminary matter for the court, rather than the jury, since it does not reach the merits of the claim but instead involves the very existence of the claim itself. ***"

Again, this Court suggested in its opinion:

"This suggests, in our estimation, that the discovery doctrine is itself subject to some restraint as the time from the occurrence of the malpractice grows greater. In such circumstances, the considerations of fairness to the defendant underlying statutes of limitation become more insistent, while the plaintiff's appeals to equity implicit in the discovery doctrine become less so. We belief the Idaho courts would apply a concept akin to the equitable doctrine of laches to limit the discovery rule, a rule which itself has its genesis in equity. Thus, the suit of a plaintiff who is reasonably diligent may be barred it the defendant shows undue prejudice because of an extreme lapse of time between the commission of the wrongful act and the commencement of suit. ***"

And, lastly, this Court gave the following admonition:

"Factors which might be considered in making such a determination would be illustrated by but not limited to: the nature of the alleged injury, the relative difficulty of proving the wrong as contrasted with rebutting that proof, the availability of witnesses and records, the existence of a continuing relationship between doctor and patient, and the inherent difficulty

of discovering certain wrongs."

As heretofore pointed out Appellant has not only missed the points of law involved in this case but has entirely misconstrued the opinion of this Court in Owens vs. White, et al , 342 Fed 2d 817, and from page 29 to the middle of page 54 has not only argued that this Court opinion was wrong but that the trial Court erred in following it. She insists, notwithstanding this Court's opinion, that the "discovery doctrine" was a question of fact for the jury in harmony with their demand that a trial be had upon all issues of fact. If, in the judgment of the Appellant, this Court's opinion in Owens vs. White et al, supra, was erroneous her duty was plain to petition for rehearing and point out the errors. This was not done and that opinion stands as the law of this case and the directional procedure to the trial Court.

Agreeable with the opinion of this Court and the admonitions and suggestions therein contained, the trial Court on June 2, 1965, spent a very, very long day in taking testimony from all parties involved in the action, and from this testimony made certain Findings of Fact which will hereinafter be referred to.

Almost at the outset of Appellant's brief, on page 16 thereof, it is argued that the basis for the "discovery doctrine" as set out in the Idaho case of Billings vs. Sisters of Mercy of Idaho, 86 Idaho 485, 389 Pac 2d 224 (1964) has been recognized in this state, as announced i

Gerlach vs. Schultz, 72 Idaho 507, 244 Pac 2d 1095 (1952). The "discovery doctrine" as used in malpractice cases is purely a rule of equity and this has been overlooked by the Appellant. **Gerlach** is a case based upon fraud and the statute of limitations in affect at the time of the **Gerlach** decision was as follows:

> "Section 5-218 I.C.
> 1. ***
> 2. ***
> 3. ***
> 4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The applicable statute that we are dealing with in the current case is Section 5-219 I.C., which is as follows:

> "Section 5-219 I.C.
> 1. ***
> 2. ***
> 3. ***
> 4. An action to recover damages for an injury to the person, or for the death of one caused by the wrongful act or neglect of another.
> 5. ***
> 6. ***"

Thus, it is seen that these cases dealing in fraud and the discovery thereof have no application whatsoever to the case at hand.

It is utterly astounding that the Appellant should argue that the matter of summary judgment should be

raised by an answer, in light of the record in this case At the time the motion for a summary judgment was being discussed the question arose as to whether, in the light of the record, the Defendants should be required to file their answer and set up the matters that were being raised by the motion, and the trial Court very apt made this observation to Mr. Vernon K. Smith, trial counsel for the Appellant, which starts at page 18 of Volume 3 of the Transcript of Record on Appeal in this case:

> "THE COURT: Well, you have touched on one thing and I have a feeling that this is important in this case and it no doubt will go to the Circuit Court again, I think it was unfortunate that it went without the key issue being decided the other time and it was not necessary for it to occur. It shouldn't have been necessary to have more than one appeal.
>
> The first thing that worries me is your contention that the matter on the summary judgment doesn't properly bring these issues before the court as of today. I want to ask you if you stand on that position because certainly the defendants could promptly this afternoon file answers in which they raise the Statute of Limitations and they recopy and file their motion for summary judgment. What I am asking you is if that is what you want to stand on because then counsel might want to protect themselves, file their answers and then a summary judgment.
>
> MR. SMITH: I can't see where I would gain by it.

Clearly and without any further comment whatever we have the acceptance of the Appellant that the Court should decide the matter on the record as it stood, without requiring the Defendants to plead the statute of limitations by way of answer. If the above is insufficient, we call the Court's attention to Finding No. II of the Findings of Fact and Conclusions of Law as found in the Clerk's Transcript at page 219, which is as follows:

> "At the said hearing of August 23, 1965, counsel for the plaintiff stipulated that the Motion for Summary Judgment was properly before the court and directed to the plaintiff's Amended Complaint, waiving the objection that an Amended Answer to the Complaint, or in the alternative, a Motion raising the Statute of Limitations, had not been made."

With what grace can the Appellant now argue before this Court that the trial Court committed error in considering the matter of the statute of limitations on the motion for a summary judgment without it being pled in an answer?

The next question now raised by the Appellant is that the findings of fact made by the trial Court are supported by no or insufficient evidence. At the hearing before the Court on June 2, 1965, the question for determination was whether the "discovery doctrine" should be invoked in this case. That was the question of fact to be determined by the Court under all of the evidence,

facts and circumstances.

Before we go to the facts let us examine the Idah Law so we will know what yardstick to use as a measu ment. There are many cases in Idaho on this question In **Chatterton vs. Luker,** 66 Idaho 242, 158 P 2d 809, was said by Justice Miller speaking for a unanimous Court, as follows:

> "(3-5) We think all that need be said relative to the evidence, or the sufficiency thereof, is governed by the following authorities:
>
> The recent case of **Checketts v. Thompson,** 65 Idaho 715, 152 P 2d 585, wherein it is said:
>
> 'This Court has repeatedly held that where conflicting evidence is submitted to a trial court sitting without a jury, either as a court of law or as a court of equity, the findings of the court on questions of fact will not be disturbed where there is competent evidence to support them. (**Viel vs. Summers,** 35 Idaho 182, 209 P. 454; **Davenport v. Burke,** 30 Idaho 599, 167 P 481; **Lus v. Pecararo,** 41 Idaho 425, 238 P 1021; **Collins v. Hibbard,** 48 Idaho 178, 279 P. 619; **Snell v. Stickler,** 50 Idaho 648, 299 P 1080; **State v. Snoderly,** 61 Idaho 314, 101 P 2d 9; **Roddy v. State (Idaho),** 139 P 2d 1005; **PiccIano v. Miller (Idaho),** 137 P 2d 788; **McCarty v. Sauer (Idaho),** 136 P 2d 742.'
>
> And again, in the case of **Nelson vs. Altizer,** 65 Idaho 428, 144 P 2d 1009, it is said:
>
> '"Furthermore, where the facts "might very

well lead different minds to reaching different conclusions upon the issue presented; and where such is the case, however meager the evidence, if it is of a substantial nature and character (as in the instant case), the findings of the triers of fact should prevail." (McKissick v. Oregon Short Line R. Co., 13 Idaho 195, 89 P. 629; Fleenor v. Oregon Short Line R. Co., 16 Idaho 781, 803, 102 P 897; Denton v. City of Twin Falls, 54 Idaho 35, 43, 28 P 2d 202; Call v. City of Burley, 57 Idaho 58, 62 P 2d 101, 105." (Dickey v. Clarke (Idaho), 142 P 2d 597, 602.")

And again, in the case of Wiori vs. Anaconda Copper Mining Co. (Montana), cited as 156 P 2d 838, it is said:

'On the review of a decision of the District Court the presumption is that the decree of that court is correct (citing cases), and that its judgment will not be set aside unless there is a clear preponderance of the evidence against it.'

Again, in Conley vs. Amalgamated Sugar Co., 74 Idaho 416, 263 P 2d 705, the Idaho Court said:

"After the court has found, the criteria are not what other or different findings the evidence could or would sustain, not what findings are plausible, not the weight or quality of the evidence or credibility of witnesses, but the sole criterion is simply whether there is substantial evidence, regardless of conflict, to sustain the findings as made, with all reasonable inferences and intendments in favor thereof. This proposition is so universal, so oft repeated and

> adhered to as to need no citation of authority in support thereof. It is not what evidence tends to support appellant, or negative that favorable to respondents, but it is what evidence tends to support respondents, with all reasonable inferences and intendments to be drawn in favor of respondents, which controls the determination of the controversy in this Court."

Is there then substantial evidence, regardless of conflict, to sustain the findings as made by the trial Court with all reasonable inferences and intendments in favor thereof? We will discuss these findings in the order in which they are attacked.

Finding No. 1

> "That the plaintiff was, for a number of years prior to the surgery, a registered nurse, actively pursuing her profession, and was a college graduate with a degree of Bachelor of Science in that field."

At page 100 Tr. commencing at line 3, we find the Appellant testifying:

> "Q Now prior to August of 1951, Mrs. Owens, where were you living?
>
> "A Prior to what?
>
> "Q August of 1951.
>
> "A Immediately prior I was in Pocatello for a few months but for several years before that I lived in Salt Lake City.
>
> "Q At Salt Lake City what training or education did you receive there?

"A Bachelor of Science degree in education from the University of Utah.

* * * *

"Q Did you work in a hospital there at Salt Lake University?

"A In the University Hospital.

"Q Was this during your marriage?

"A Yes.

"Q What period of time did this cover, if you remember?

"A I worked at Salt Lake General for about a year and a half between 1948 and 1950, I think--no it was 1947 and 1949.

"Q You worked in the Salt Lake General Hospital?

"A Yes."

And again at page 103, commencing at line 11 through line 24:

"Q All right, now your nurse's training and background, Mrs. Ownes, what has that taught you or what had that taught you concerning the selection of a doctor and the sticking with that doctor once your selection has been made?

"A Well, I was cancerwise because I had been working with Dr. Wintrobe in Salt Lake City, who is a leader in a type of malignancy-- blood disorders--and I had

> been teaching and I worked with doctors and I know they are not all of equal ability, the same as any field, and my feeling was that you take your time im making selection and then after you made it if they say, "Put your head in a barrel," you say, "Where is the barrel."

Commencing at line 19, page 149 of the Transcript, the Appellant advises the Court that she had continued her nurse's educational training by attending a workship at the University of Colorado in 1955, had attended Wayne University in Detroit, Michigan, and on page 150 of the Transcript at lines 13 to 22, she was a nurse in the Ar during the years 1943 and 1944. At page 147, commen with line 11 of the Transcript the Appellant advised the Court that she took her nurse's training at the Good Smaritan Hospital in Portland, Oregon, which involved three years of study, and that she is a registered nurse This was in 1943.

There can be no doubt that there is substantial evidence to sustain the trial Court's Finding No. 1.

Finding No. 2

> "That she remained, during all of the time after the surgery, actively in the nursing profession, working in hospitals, and was also active in cancer prevention work."

About the middle of February, 1952, Appellant returned to Pocatello, Idaho (Tr. p. 109, l. 11) where she immediately went to work for the Bannock Memoria

Hospital (Tr. p. 109, l. 6). Sometime between 1952 and 1956 Appellant joined her husband in Montana for a year, but returned to Malad, Idaho, in 1956, (Tr. p. 146, l. 15) where she worked with the American Cancer Society during 1956, 1957 and 1958 (Tr. p. 114, l. 25). In 1955 she took special training at Wayne University in Detroit, Michigan (Tr. p. 149, l. 25). In 1959 Appellant went to California to enter the employment of the Government in the Veterans Administration Hospital. See testimony commencing at line 25, page 116 continuing over to and including page 118, line 12, in which it is shown that Appellant has been continuously employed as a nurse by the Government in its Veterans Administration Hospital at Palo Alto.

It is not attempted to show all of the activity of the Appellant in the nursing profession since the surgery in 1951, but the above is more than ample to support the Court's Finding No. 2.

Finding No. 3

> "That the plaintiff was orginally advised prior to surgery, that the lump in her left breast was benign. One or two days after the plaintiff was so advised, a defendant called her by phone, to inform her that an error had been made and that the tissue was malignant, in that it was cancerous."

We could, to support this finding, refer to the testimony of the Appellant herself as found at Tr. p. 104,

lines 15 to 22:

> "A He said, "You are a lucky girl. It is benign. You can go home," and so I got up and went home.
>
> "Q When was the next time you heard from Dr. White?
>
> "A The next day, I believe about dinner-time. He called me and said that there had been a mistake and that they did find some malignant tissue cells and I would be in the hospital the next morning."

Finding No. 4

> "That after the surgery, plaintiff was advised by the defendant, Dr. White, that the excised flesh contained no malignant cells, and that all of the malignancy had been in the tissue removed in the biopsy which was performed prior to the surgery."

On page 116 of the Reporter's Transcript comme ing at line 16, we find the appellant testifying on direct examination and it answer to a question asked by her o counsel, as follows:

> "A No, I am speaking of the fact that I had been told by a competent expert in the field that this is your diagnosis and I believed it. I even saw the pathology report with--Dr. White, when I was in the hospital and I imagine because I am a nurse and I was apprehensive I wanted to know was it a little amount or

> big amount and he said, "I think we got it all," and he showed me the report, I think to be reassuring, and it said they didn't find any malignancy--I saw the pathology report."

Finding No. 5

> "That the plaintiff professed to be conscious and worried, at all times after the surgery, of the possibility of a recurrence of development of cancerous cells in her body."

On page 106 commencing at line 8 of the Reporter's Transcript, we find the Appellant giving this answer on her direct examination:

> "A Well, I was 31 years old and had two children, one four and one one, and I knew that this was broad generalization but usually your chances of surviving with a malignancy in the sex organs during the child bearing age are not as good as if you are out of the child bearing age. So I was concerned about whether I was going to live or die and I asked Dr. White and he said, "Well, of course, I don't know, but we are going to do everything we can to see that you live," and he outlined what they were going to do."

Again, on page 115, lines 3 to 11, Appellant states that she had checkups and examinations at least once a year, and commencing at line 23 on page 115, she said:

> "A I had complete physicals with special attention to whatever I was--a current

> problem. If I would talk about being tired, Dr. White had a PBI--special test to see if the thyroid was regulated. I had blood work, and then a lot of reassurance because the menopause and the breast amputation caused difficulty for me psychologically, I felt. I had some problems and he would--he was helpful with these too.

Even before the biopsy this Appellant was very cancer conscious (Tr. p. 135, L. 14-17).

Again, on page 136 of the Transcript commencing at line 15, we find this:

> "Q Now another reason why you were cancer conscious is that your father died with cancer, didn't he?
>
> "A Yes, that is true.
>
> "Q And your aunt died with a cancer?
>
> "A That is true.
>
> "Q And you gave that history to Dr. White, didn't you?
>
> "A I imagine I did."

In light of the above, how can anyone question the fact that there is substantial evidence to support the Court's finding that the Plaintiff was conscious and worried of the possibility of recurrence of cancerous cells in her body!

Finding No. 6

> "That plaintiff knew at all times that great improvements were being made in the diagnosis and detection of cancer in the human body. She worked, through the years after the surgery, in hospitals where laboratories were maintained and pathologists retained."

As elsewhere pointed out Appellant was actively engaged in cancer work with the American Cancer Society as early as 1956, and in 1959 went to California. She worked closely with Dr. Shaw after she went to work at the Government Hospital in California (Tr. p. 119, L. 2-5). She assisted in opening the hospital at Palo Alto in April of 1960 (Tr. p. 119, Ll. 17 & 18).

> "Q Now when you were there at the hospital, Mrs. Owens, was there some sort of research going on relating to somewhat of a new technique in connection with early detection of breast mastitoides?
>
> "A We have many research problems in the hospital, one of them is--it had to do with making determinations about the selecting of the breast cancer patients that would be candidates for surgery and done on the basis of--we save urine and measure the calcium--
>
> "Q You are saying calcium in the urine?
>
> "A Well, I will put it--there are many research things going on. ***"
>
> (Tr. p. 120, Ll. 9-21)

On page 130, lines 10-19 Mrs. Owens testified that she worked at hospitals the size of the Defendant St. Luke's Hospital in Boise, and that she had never worked in one of that size that did not have on its staff a pathologist.

Finding No. 7

> "That plaintiff knew at all times that the defendant hospital records and the slides on which the diagnosis was predicated were available for examination and diagnostic examination at her simple request."

With reference to this Finding, Appellant was asl this question:

> "Q As a registered nurse and with the background and experience you have had, you have been aware during the entire period since the operation that the slides and your chart were available to you and your doctor elsewhere if you cared to secure them; isn't that true?
>
> "A Surely."
>
> (Tr. p. 160, Ll. 18-24)

At page 236, starting at line 9 to the comment of the Court at line 25, it appears:

> "MR. MARTIN: The evidence on the behalf of the defendant doctors would show that the records of the plaintiff while in the hospital under care and treatment as well as the care and treatment given by Dr. White and Dr. Popma would have been available to any recognized physician or hospital at any time

upon request. Just as the request of Dr. Shaw was honored.

The evidence would show that no request was received by anyone--made by any doctor or hospital at any time other than that by Dr. Shaw, which request was made on the date as shown by the exhibit.

MR. SMITH: I believe, Mr. Thomas, I would be willing to accept that as a stipulation that Mr. Martin just put in.

MR. THOMAS: Yes, so stipulated."

Finding No. 8

"For a period of eleven years from the date of the surgery she made no investigation to determine the accuracy of the diagnosis on which the surgery was based."

The evidence supporting this Finding is found at pages 142, 143 and 144 of the Transcript and commencing at page 142 at line 9, this question was asked:

"Q Was there anything that Dr. McCarter did or did not do which kept you from making any investigation to see whether the tissue was benign or cancerous which was removed from your breast in 1951?

"A There isn't anything that anybody did in the world that either caused or kept me from making an investigation of the tissue that was taken from me. It never occurred to me to investigate my own tissue. I don't know that much.

(Tr. p. 143, L. 12)

"Q From that answer, I take it, you made no investigation whatever of any kind or character until you attended this Shaw lecture in 1962?

"A I never made any investigation. ***"

(Tr. p. 143, L. 16-20)

Finding No. 9

"That twelve years elapsed between the date of surgery and the date suit was filed."

The surgery, as shown by the record, (Tr. p. 25 L. 6) was performed September 1, 1951. The Complai was filed October 14, 1963 (Clerk's Transcript Volume 1-A, page 6).

Finding No. 10

"That the tissue samples on which diagnosis was had were originally treated and placed on slides, which slides are now deteriorated to some degree."

On page 240, Transcript, between lines 5 and 20 we find Dr. McCarter talking about these deteriorated slides of the tissue of the Plaintiff as follows:

"Q What have you to say to the Court as to whether or not time has deteriorated the color of these slides?

"A Time does as regards all sections and these do show a degree of deterioration of fading and of stains so that they are not as sharp as they were ten years ago.

"Q Or 14 or 15 years ago?

"A Right.

"Q Does that fading made it more difficult for these slides to be interpreted?

"A It does to a degree, yes.

"Q And does it have an effect upon the reading or interpretation of the slides?

"A To a certain extent it does, yes."

Again, at page 246, Transcript, from line 19 to the bottom of the page, we find Dr. McCarter reiterating but in different words, the same thing:

"Q Doctor, at one point you commented there is a change in color. Is that right? Did I understand you right, there is a change in color?

"A There is a fading of stains in practically all sections over a matter of years.

"Q Are they as distinct today in their appearance as they were in 1951?

"A Not as distinct, no."

No attempt was made by the Plaintiffs to introduce any evidence to contradict Dr. McCarter in this regard. However, on a most soul searching cross-examination by Mr. Smith in connection with these slides we find these questions and answers at page 257, Transcript,

lines 11 to 17:

"Q But they are still readable?

"A Yes, readable as you could read an old book in poor light.

"Q What is that?

"A They are still readable in the same sense that you could read an old book in poor light."

Finding No. 11

"That evidence as to the standard of care and competence ordinarily exercised by physicians, especially pathologists in the detection and diagnosis of cancer, in the Boise, Idaho, area, in the year 1951, will be most difficult to procure."

In regard to this Finding we call the attention of the Court to the following testimony, commencing on page 241, Transcript, line 1:

"Q Comparing the present day knowledge of sclerosing adenosis to tissue with sclerosing adenosis tissue in 1951, what advancement has been made?

"A I think that they may be answered by saying that the concept of so-called sclerosing adenosis, a form of proliferation of breast tissue, has been recognized really and first described in the late '40's, as I recall, and that the experience with regard to this diagnosis, of course, has been increased and some attention has been called to it. At the present time

there is considerable more information about sclerosing adenosis than there was 15 years ago. The same with regard to a great many other forms of disease in the breast.

"Q In other words, the science is and has been progressing in these 14 years?

"A Very much so, yes, and not only in the matter of a description of the pathology and the reading of the sections but in the correlation as between the sections and the clinical progress of cases and so on."

And again, on page 242, commencing at line 3 we find this question and answer:

"Q What factors will arise here that will enter into the difficulty in placing this before a jury as of 1951?

"A It is really very difficult to understand what the legal situation is. The scientific situation is that I don't believe that we can go back 15 years as easily as we can go back 5 years to reconstruct what our thinking was at the time and what details of information were available to us which have not been put down in records and which have, however, been communicated as between the surgeon and pathologist and as between the pathologist through his reports to the surgeon, and a number of those details which certainly do have--do add up. None of us can remember things as well back 10 or 15 years as we can 5 years or a lesser time."

On page 243 of the Transcript, Dr. McCarter tells us that Dr. Carl of Twin Falls, Idaho, who has been there two or three years is about the same age as himself and has had the same period of schooling, and that unless Dr. Carl was reading these kind of slides i 1951 he would know of no other doctor available to test

On page 245, Transcript, lines 4-10, we are tol that Dr. Helen Craign was practicing pathology in 1951 but that at the time of the trial she was incapicitated a living in a nursing home. Bless her soul, she has since passed on.

Finding No. 12

> "That while the plaintiff sometimes sought out the defendant, Dr. White, for medical attention, during the years after her surgery, she also saw and consulted other physicians and did not rely solely on Dr. White for medical advice and treatment. That the plaintiff has not lived in the community or general vicinity of Boise, Idaho , from the date of surgery until the present time. That there was not a continuing relationship of doctor and patient after the postoperative surgery and treatment in the usual sense between the plaintiff and the defendants."

There is a conflict in the evidence with reference to this Finding. That Dr. Roberts of Pocatello was ve close to the plaintiff and that she looked to him in the final analysis cannot be disputed. Many times she mad statements of the same or similar import, as:

"A Dr. Ed Roberts in Pocatello, who had been my family physician all my life. ***"

(Tr. p. 102, L. 24)

After she had her surgery and returned to Pocatello, Idaho, in February, 1952, she called on Dr. Roberts and we find this:

"Q What conversations, if any, did you have with Dr. Roberts concerning your past surgery and how you should continue with Dr. White?

"A All about it, really. I showed him the surgery that was very good looking and he thought so too and confirmed what I already knew. ***"

(Tr. P. 110, L. 9-15)

Again, with Dr. Roberts we find this testimony:

"Q Now in 1956 you had Dr. Roberts of Pocatello, E. N. Roberts, who you knew, write Dr. White for your past history so that he could treat you, he, Dr. Roberts, did you not?

"A I don't recall, but Dr. Roberts has been our family doctor all my life and the day I was operated on I think I asked Dr. White to call Dr. Roberts and tell him and he had been in communication with Dr. Roberts simultaneously whenever I was Dr. White's patient."

(Tr. P. 139, L. 25- P. 140, L. 6)

Mrs. Owens testified to checkups by Dr. White but could not give the Court any dates which this was

supposed to have been done.

As opposed to her testimony concerning both vis examinations, and correspondence, Dr. White testifie as follows, commencing at page 188, line 13 over to a including page 189, line 25:

"Q Did you see her or correspond with her between the month of February, 1952, and when she came back for this tyroidectomy in 1956?

"A It was the month of April, 1952, when I last saw her concerning the breast problem and I next saw Mrs. Owens on January 27 of 1956.

"Q Did you have any correspondence with her between those dates?

"A There was a letter that Mrs. Owens had written to me that she had seen a Dr. Parks in Pocatello---

MR. SMITH: I object on the grounds the letter would be the best evidence.

THE COURT: Well, he is just testifying he received a letter. He is not testifying to anything else.

"A I received a letter from Mrs. Owens.

"Q When after the thyroidectomy did you receive any correspondence from her with reference to giving Dr. Roberts your history of her?

"A Dr. E. N. Roberts of Pocatello?

"Q Yes.

"A In June, 1956, the early first days of June.

"Q Was that transmitted to Dr. Roberts?

"A Yes, sir.

"Q Now, Dr. White, did you either see or hear from her in 1957?

"A I never heard from Mrs. Owens in 1957.

"Q Did you see her in 1958?

"A I saw her in August of 1958 at which time I did a complete physical examination upon her as a routine physical as a general checkup for health.

"Q Now when was the next time that you saw or heard from her and where was she?

"A She was in California and she had written the letter which I mentioned this morning and my reply to her was on October 31, 1959. This was my last contact with the patient."

No attempt has been made to cite all of the testimony supporting the Findings of the trial Court. It is sufficient to say the citations show there is substantial evidence to sustain every Finding and that under the Idaho Law is all that is required.

When the Court rendered its Memorandum Decision on June 22, 1965, eliminating the "discovery doctrine"

from the case, it was obvious that the Plaintiff was out of Court, but in the Memorandum Decision the Co gave to the Plaintiff 30 days within which to file an Amended Complaint in which she could raise the ques tions that had been alluded to during the hearing on June 2, 1965, namely, her status as a married woma the doctor-patient relation between the Plaintiff and Dr. White and the absence of Dr. White from the jurisdiction of the trial Court following September 1, 1961, and by the Amended Complaint these three matters are found as Paragraphs X, XI, and XII of the Amended Complaint. (Clk. Tr. pp. 125 and 126).

Paragraph XI of the Amended Complaint, namely the doctor-patient relation had already been passed upon by the Court as Finding No. 12 in the Findings o Fact of the Court in its Memorandum Decision of June 22, 1965 (Clk. Tr. Vol. 1-A, pp. 116 at 119). Thusly, if the statute of limitations was not tolled by the fact that the Plaintiff was a married woman up to August of 1959, obviously the statute of limitations had run on her cause of action September 1, 1953, more than 10 years before she actually filed her Com plaint. When the Court determined at the hearing on June 27, 1965, that the statute of limitations was not tolled and that Mrs. Owens was not under a handicap or disability and could have filed her action at any tim between September 1, 1951, and September 1, 1953, there was nothing before the Court except to grant the

motion for a summary judgment.

By Paragraph X of the Amended Complaint Plaintiff pled that between the dates of 1951 and 1959 she was a married woman, although she did not plead during any of this time she was living with her husband (**Lorang vs. Hays,** 69 Idaho 440, 209 Pac 2d 733).

A review of the history of Section 5-230(4) I. C. and related statutes as well as the pertinent decisions of the Idaho Court is necessary to an understanding and a decision of this question. Section 5-230(4) I. C. now reads as follows:

> "If a person entitled to bring an action, other than for the recovery of real property, be, at the time the cause of action accrued, either:***
>
> 4. A married woman, and her husband be a necessary party with her in commencing such action;
>
> The time of such disability is not a part of the time limited for the commencement of the action."

The first statute establishing such disability as a cause for tolling the running of the statute of limitations was enacted by the Territorial Legislature in 1863-64. This statute provided:

> "If a person entitled to bring an action, other than for recovery of real property***be, at the time the cause of action accrued, either ***

> Fourth. A married woman; the time of such disability shall not be a part of the time limited for the commencement of such action." (Territorial Session Laws 1863-64, p. 557).

In the enactment of the Code of Civil Procedure of 1881 the statute was changed to read as it does at the present time (Territorial Session Laws 1880-81, p.3 It has been carried in the same form in subsequent c fications and compilations of the statutes. During thi same period until 1903 there was also in force a stat which required that a married woman's husband be joined with her when she was a party to an action. T statute was first enacted as Section 7 of the Civil Pra tice Act of 1863 (Territorial Session Laws 1863-64, 78). The statute as first enacted provided that:

> "When a married woman is a party, her husband shall be joined with her; except, that when the action concerns her separate property, she may sue alone; when the action is between herself and her husband, she may sue or be sued alone."

This statute was carried in the Revised Laws of Idah (1874-75) in the same form (Territorial Session Laws 1874-75, p. 80). The statute was modified to change the word "shall" to "must" in the first clause and to add two additional exceptions, in the Code of Civil Procedure of 1881. The additional exceptions were:

> "When the action concerns her*** right of claim to the homestead property ***"

and

> "When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them ***."
> (Territorial Session Laws 1880-81, p. 35).

The statute was carried into the Revised Statutes of Idaho (1887) as section 4093 in the same form. Thus, while these statutes were in force, the exceptions set out therein were the only cases in which a wife could sue and be sued alone. It was, therefore, a logical part of a unified statutory scheme to also provide as was done in the related statutes, heretofore noted, for the tolling of the statute of limitations in those cases where the husband had to be joined as a party with a married woman. However, in 1903 a married woman's common law and statutory disabilities as to suing and being sued alone were removed. In that year the legislature provided that,

> "A woman may while married sue and be sued in the same manner as if she were single ***".
> (Idaho Session Laws, 1903, p. 346).

While I know of no case which has so held, subsequent code compilers have rightly, it seems, concluded that the old section 4093 of the Revised Statutes of 1887, which provided that a married woman is a party her husband must be joined with her, was repealed by implication, and the text of the act does not appear in any compilation of the statutes since 1887. However, the

compilers have seemingly inconsistently continued to carry the text of subdivision 4 of section 4070 of the Revised Statutes of 1887 (now Section 5-230(4) I.C. This provision seems entirely inconsistent with the 19 act which removed all disabilities married women had theretofore been under so far as being able to sue alon It will be noted that this particular question has been t subject of considerable conflict in other states involvi statutory removal of disability of coverture. (34 Am 166, sec. 209; McIrvin vs. Lincoln Memorial Univers 197 SW 862 (Tenn.); Anno. LRA 1918C, 193). The writer of the annotation last cited after stating the rea given for the conflicting views states that (p. 203)

> "While the weight or trend of authority cannot be said to be clearly one way or the other on this question, the more plausible view seems to be that the disabilities referred to in Statutes of Limitation entitling married women to bring actions within a specified time after the disabilities are removed are not the moral influence or so-called 'quasi-duress' exercised by the husband, but the common-law legal disabilities arising from the marriage relation, and that when these are all, or substantially all, removed by statute, the 'disability' is removed within the meaning of the exception."

It is true that there are still cases where a husb is held to be a "necessary" party with the wife (see Brockelbank, The Community Property Law of Idaho, (Chapter VIII). This, however, is not because a wife under a disability, but because of the substantive law

governing causes of action and rules governing real parties in interest and joinder of parties having joint interests, etc., which substantive law and rules are applicable to all litigants.

Since the disability which gave rise to the need for the provisions of Section 5-230(4) I.C. has been removed, there is no longer any need for this protection.

In considering this question, it is noted at the outset that the various considerations just discussed, which lead to the conclusion that Section 5-230(4) I.C. has been repealed by implication, likewise lead to the implication, it is no longer applicable to cases such as the one under consideration. If this statute is construed in pari materia with the statute enacted by the same session of the legislature requiring that the husband be joined with the wife in all actions to which she is a party with the exception of certain specified cases (Revised Statutes of Idaho (1887) Section 4093), then it would seem that the phrase "necessary party" in Section 5-230(4) I.C. must refer to the related statute (Revised Statute, Section 4093) making the husband a necessary party with the wife. Since Section 4093 of the Revised Statutes was repealed by implication by the act of 1903 in providing that

> "A woman while married may sue and be sued in the same manner as if she were single"

there are no longer any cases in which the husband is a

necessary party in that sense. Therefore, it would appear that even if Section 5-230(4) I.C. is still in forc coverture no longer suspends the operation of the statu of limitation in any case.

Manifestly, there are also other reasons why the statute is not applicable. The general purpose of such statute is to protect a married woman against the runn of the statute of limitations against any cause of action which might have been enforced by her except for her marriage (34 AmJur 164-165, Section 206; 16 CalJur Section 155). The statute should be construed with thi purpose in mind. Viewed in this light the qualifying ph in the statute in question "and her husband be a necess party with her in commencing such action" has added significance. It is the commencement of an action whi tolls the running of the statute of limitations, (5-214, 5-228, I.C.). Hence, if a married woman has a cause of action which she is entitled to bring, and she can co mence the action without the joinder of her husband, th running of the statute of limitations is thereby tolled a she has no need of the protection of Section 5-230(4) I. C. and does not come within its purpose. This is true even though upon proper objection her husband might b required to be joined later in the action. This likewise conforms to the literal wording of the statute, since th conditions of the statute are not met merely because th husband in some sense could be said to be a "necessar party", but he must be a necessary party in "commenc

the action" i.e., indispensable. Our Supreme Court has directly held in the case of Muir vs. City of Pocatello, 36 Idaho 532, 212 Pac 345, that a married woman could commence an action to recover damages for her personal injuries and thereby toll the running of the statute of limitations without joining her husband with her. In the Muir case, the action was commenced by the wife alone to recover for personal injuries within two years after the accident occurred. More than three years after the accident occurred, in the course of the trial, the Defendant was allowed to amend its answer setting up Plaintiff's coverture and Plaintiff was allowed to amend her Complaint by adding her husband as a party Plaintiff. Ultimately the husband and wife obtained a judgment, and on appeal the Defendant contended in substance that the action had not been "commenced" until the husband was made a party and that the statute of limitations had run at that time and the action was barred. However, the Court rejected this argument and held the action had been commenced before the running of the statute of limitations, that is, before the husband had been joined as a party. The Court stated (36 Idaho at page 540)

> "If a married woman has such an interest in an action for injuries to her person or character that she may maintain an action therefor, even though her husband is a proper party, it would follow that her commencing such an action within the limitations period will toll or suspend the running of the statute so that the bringing in of the husband as a party

> after the lapse of this period would not be the substitution of a new or different cause of action, nor would the right of either party in so doing be barred by the statute."

This language clearly recognizes the right of the wife commence an action for injuries to her person without having the husband joined at the commencement of the action. If the husband had been a necessary party to commence the action the action would have been barre by the statute of limitations since the action was, in fact, commenced by the wife alone and the husband wa not made a party until after the statute had run. In other words, if the husband is a necessary party to commence the action it would have been impossible to hold in the Muir case, and the Court did, that the acti was commenced before the running of the statute.

The conclusion that the husband is not a necessa party to the commencement of such an action is furthe borne out by the language of Justice Rice in concurring in the Muir case where he stated (36 Idaho at page 544)

> "C.S., sec. 6637 (now Sec. 5-302, I.C.), which is quoted in the principal opinion, grants to a married woman the unqualified and unlimited right to sue. In the cases of **Kohney v. Dunbar**, *** it was held that the wife's interest in the community property is a vested interest of the same nature and extent as that of her husband. There can be no doubt that in case of the failure of the husband to bring necessary actions for the

> protection of the community property, the wife who has been empowered by statute to sue in her own name can maintain any proper action for the protection of her interest in the community property." (Parenthetical material added).

A matter of further significance in considering the Muir case is that if Section 5-230(4) I.C. was applicable, the Court would have had no occasion to determine when the action was commenced for purposes of tolling the statute of limitations. The statute of limitations would not have run against the Plaintiffs in that case, since they were living together and were married both at the time of the accident and at the time of trial. If Section 5-230(4) is applicable to such cases it is extremely remarkable that the Court devoted the extensive consideration it did to whether the action was barred by the statute without once mentioning this section. Perhaps in this regard, a further statement by the Court in the Muir case is significant.

> "A law which attempts to extend to a married woman all the rights and privileges of persons sui juris, where she is seeking to enforce her rights against other persons, and does not give to such persons correlative rights against her, but places her under the disabilities of the common law when being sued, often leads to incongruities and inability to administer exact justice under such system, because no class of citizens can property be given the rights and privileges of fully emancipated citizens without being required to assume the corresponding duties

and obligations of such citizenship.

" * * *

"* * * in jurisdictions having similar statutes, the weight of authority and perhaps the better reason sustain the view that a married woman has such an interest in a cause of action for injuries to her person or character that she should be permitted to maintain actions of this kind, although her husband is a proper or even necessary party, in order to render the judgment res adjudicata against both members of the marital community. It may be questioned whether one of this class of citizens, now fully emancipated under the federal constitution as citizens of the United States, can be deprived of this right solely because of her being a married woman, without denying rights and immunities granted by fundamental law, when other citizens have such rights, particularly in view of C.S., sec. 6637, which provides that: 'A woman may while married sue and be sued in the same manner as if she were single, etc.'

"However this may be, the trend of modern legislation and also of judicial decisions is toward recognizing the right of married woman to sue alone for personal injuries to herself." (Parenthetical material added).

In the Nevada case of **Frederickson & Watson Co Co., et al vs. Boyd,** 102 Pac 2d 627 (1940), Justice O later a member of this Court, speaking for the Nevada Court, made a beautiful analysis of the status of a married woman with relation to her legal rights.

From the analysis above made there can be no

reasonable doubt in the case at bar of the following:

(a) That the Appellant Anita T. Owens could, under existing law, have commenced an action against these Defendants at any time within two years following her operation in 1951, and that by failing to do so she lost her right of action.

(b) That her then husband Jedd G. Owens was not a necessary party to the commencement of the action.

(c) That the allegation in her Amended Complaint, Paragraph XII, that Dr. White left the State of Idaho on or about September 1, 1961, becomes entirely immaterial.

(d) That the Plaintiff's alleged cause of action is barred by the provisions of Section 5-219(4) I. C. as to all three of the Defendant Doctors.

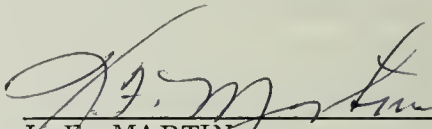
(e) That there is no genuine issue of any material fact existing in this case and a summary judgment was properly entered.

CONCLUSIONS

All of the argument by the Appellant in the opening Brief about refusal of the trial Court to submit the factual questions presented to a jury just has no foundation whatsoever to stand upon. This Court in the former opinion of **Owens vs. White, et al, supra,** laid down the ground rules for the trial Court to follow and this the trial Court did. In a few instances there was a conflict in the testimony but essentially there is little conflict. The evidence is ample to show that for 12 years the

Plaintiff slept on her right to bring this action and the trial Court held under the facts it would be inequitable to the Defendants to permit the Plaintiff to invoke the "discovery doctrine". The Defendants submit the judgment of the Court should be upheld.

Respectfully submitted,



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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. F. Martin

J. F. MARTIN